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June 22, 2015

VIA ELECTRONIC CASE FILING

Honorable Martin Glenn
United States Bankruptcy Court
Southern District of New York
One Bowling Green
New York, New York 10004

George P. Angelich

Partner
212.457.5423 DIRECT
212.484.3990 FAX
george.angelich@arentfox.com

Re: *Status Report Regarding 9019 Motion and Objection*

Official Committee of Unsecured Creditors of Vivaro Corp. v.
Leucadia National Corporation, et al., Adv. Pro. No. 14-02213 (MG)

Dear Judge Glenn:

Arent Fox LLP represents the Official Committee of Unsecured Creditors of Vivaro Corporation, *et al.* (the “Committee”) and submits this status report, as requested by the Court at the conference held on May 5, 2015 (the “May 5 Status Conference”)¹. As of today, the parties have not reached agreement on any disputed issues and therefore the Committee requests that the Court schedule a final hearing on approval of the 9019 Motion.

The May 5 Status Conference was held to address the (i) *Joint Motion of the Official Committee of Unsecured Creditors and the Debtors for an Order Approving the Settlement Agreement with Represented Defendants under Rule 9019 of the Federal Rules of Bankruptcy Procedure*, [ECF No. 709] (the “9019 Motion”) and (ii) *Objection to Motion of the Official Committee of Unsecured Creditors and the Debtors for Entry of an Order Approving the Settlement Agreement with Leucadia National Corporation and Related Parties* [ECF No. 723] (the “Insiders’ 9019 Objection”).

During the May 5 Status Conference, counsel for the Committee, the Debtors’ and Insiders committed to continue global settlement discussions in an effort to resolve three (3) areas of disputes (a) the Insiders’ 9019 Objection; (b) the estates’ claims for recovery of certain avoidable transfers to insiders (the “Chapter 5 Claims”); (c) the estates’ claims for damages related to breaches of fiduciary duties by the Debtors’ directors and officers (“D&O Claims”).

The Court adjourned the status conference to June 25, 2015, to permit the Committee, the Debtors, and Insiders additional time to attempt a global settlement of their disputes. The Court

¹ The relevant section of the transcript from the May 5 Status Conference is enclosed.
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asked undersigned counsel for the Committee to provide the Court with a status report by June 22, 2015.²

Background

On February 3, 2015, this Court issued a Memorandum Decision and Order granting in part the motion to dismiss and leave to amend the complaint. The Court maintained the existing discovery schedule such that all fact discovery had to be completed by May 8, 2015. The Court's decision precipitated settlement successful negotiations between the Committee and Leucadia National Corporation, *et al.* ("Leucadia").

On February 19, 2015, the Committee and Leucadia reached an agreement in principal to settle all claims between the parties in the above-referenced adversary proceeding (the "Leucadia Action") in exchange for a lump sum payment of \$8 million to the Debtors' estates. The Committee agreed to the settlement for the reasons set forth in the 9019 Motion.

On March 20, 2015, the Committee and the Debtors filed the 9019 Motion for approval of the settlement. Attached as an exhibit to the 9019 Motion was a copy of the settlement agreement that was negotiated and executed by the parties to the Leucadia Action (the "Settlement Agreement").

On April 28, 2015, Marcatel Com, S.A. de C.V., Gusma Properties, LP, Gusma Investment, LP, Progress International, LLC, Unifica Contact Media S.A. de C.V., Gustavo M. de la Garza Ortega ("Don Gustavo"), Gustavo M. de la Garza Flores, and Roberto Margain (collectively, the "Insiders") filed the Insiders' 9019 Objection, asking the Court to deny approval of the Settlement Agreement. The Insiders' principal argument for denial of the 9019 Motion is that the Settlement Agreement contains objectionable releases that might interfere with the subrogation rights of the insurers of the Insiders. The releases contained in the Settlement Agreement were required by Leucadia – even though any such claims had previously been waived and released by the Insiders on November 23, 2011. (*See* Status Letter dated June 19, 2015 [Adv. Pro. ECF No. 36]).

In advance of the hearing on the 9019 Motion, the parties to the Settlement Agreement filed their replies in support of the 9019 Motion. On May 1, 2015, Leucadia filed a reply, which

² The Court also suggested that an expedient approach to settlement negotiations would be a face-to-face meeting between the Insiders and their counsel, the Committee's counsel, a Committee professional or a businessperson from the Debtor, and representatives from all relevant insurance carriers. Such a meeting has not taken place – mainly because counsel for the excess carrier has only recently acknowledged the timeliness of the claim and joined in discussions. The Committee remains supportive of such a meeting and potentially mediation; however, this should not delay scheduling of the final hearing on the 9019 Motion.
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set forth, *inter alia*, why the releases are necessary, appropriate and supported by law. On May 4, 2015, the Committee and the Debtors filed their reply and disputed the Insiders' contentions.

On May 5, 2015, the Court held a status conference to discuss the Insiders' 9019 Objection during which the parties agreed to search for a global settlement.

In the weeks following the May 5 Status Conference, the parties were unable to reach a global settlement. Therefore, on June 9, 2015, the Court conducted a brief telephonic conference call with counsel for the Committee, Debtors, Insiders and the primary D&O insurance carrier (the "June 9 Informal Conference").

Current Status

Since the June 9 Informal Conference, some limited progress has been made. Specifically, the primary and excess D&O insurance carriers have both acknowledged that the Committee's claims under applicable D&O insurance policies were made timely, before the expiration of the claims-reporting period on June 18, 2015. First, this acknowledgement obviated the need to file the D&O Action last week. Second, the D&O carriers' acknowledgement created a path for the Committee and the Insiders to reach another extension of the tolling agreement.

On June 19, 2015, the Insiders and the Committee entered into a third tolling agreement which ends on July 9, 2015. Under that tolling agreement, the Committee has until Monday, July 13 to file adversary proceedings concerning the D&O Claims and the Chapter 5 Claims.

The Committee will continue to exercise its best efforts to settle the D&O Claims and the Chapter 5 Claims, with the participation of all interested parties, including the primary and excess D&O insurance carriers. The tolling agreement enables the parties to continue working towards a resolution of the D&O Claims and Chapter 5 Claims without resort to commencing new actions until at least July 13. With respect to the Leucadia settlement however, Leucadia, the Debtors and the Committee believe that there should be no further delay in scheduling a final hearing on the 9019 Motion.

The parties are scheduled to appear for another status conference before the Court on June 25, 2015 at 11:00 a.m. At that time, the Committee will request that the Court schedule a final hearing on approval of the 9019 Motion ("9019 Final Hearing"). We have consulted with Debtors' counsel, the Committee's witnesses, counsel for Leucadia and counsel for the Insiders³ about available dates for the 9019 Final Hearing. To facilitate scheduling, subject to the Court's

³ Counsel for the Insiders is available on July 15 but requests that the Court conduct a status conference on that date and not a final evidentiary hearing.
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availability, the Committee respectfully requests that the 9019 Final Hearing be scheduled on any of the following dates: July 15, 21, 28, or 31.

At this time, the Committee anticipates presenting three witnesses in support of the 9019 Motion: B. Lee Fletcher, William K. Lenhart, and Eric Roman. Their Declarations in support of the 9019 Motion will be offered as their declarations on direct.

In order to move forward in a timely way, and to the extent discovery is required by the Insiders and permitted by the Court, all discovery should be mutual and completed by July 10, 2015. The Insiders' 9019 Objection was filed without any evidentiary support and therefore the Committee also will require that the Insiders make a witness available for cross-examination at the 9019 Final Hearing.

The Committee remains committed to continuing settlement discussions. The scheduling of the 9019 Final Hearing is consistent with and will promote that objective.

Respectfully submitted,



George P. Angelich

cc: Thomas R. Califano, Esq.
Frederick E. Schmidt, Jr., Esq.
Rocco A. Cavaliere, Esq.

Enclosure: Excerpt of Transcript of May 5, 2015 Status Conference

In Re:

VIVARO CORPORATION, et al.
12-13810-mg & Adversary Proceedings

May 5, 2015

eScribers, LLC
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operations@escribers.net
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1 MR. SCHMIDT: Tricom USA, Inc., yeah. We've seen
2 reports that Tricom USA, Inc. simply ceased to exist. So we
3 don't think there's really anybody there to go after.

4 We haven't dismissed the case yet because if somehow
5 something rolls out of the sky, we'd like to be able to take
6 advantage of it. But at this point, we don't see much of
7 anything there.

8 THE COURT: Okay. Thanks. Anything else to report on
9 or not?

10 MR. SCHMIDT: I think that does it, Your Honor. Thank
11 you.

12 THE COURT: Okay. So let's move to the Leucadia
13 National adversary proceeding. It's adversary proceeding 14-
14 02213. It was on the calendar for a 9019 motion. There was an
15 objection to the 9019 that was filed on behalf of a group of
16 parties. I think my chambers -- Mr. Angelich reported that
17 we'd move forward today as a status conference, not an
18 evidentiary hearing, so tell me where --

19 MR. ANGELICH: Sure.

20 THE COURT: Make your appearance, and then let's talk
21 about it.

22 MR. ANGELICH: Thank you, Your Honor. George Angelich
23 of Arent Fox, counsel to the official committee of unsecured
24 creditors of Vivaro, also the plaintiff in the Leucadia action.

25 Your Honor, if I can actually just take one step back

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1 to talk about the 2004?

2 THE COURT: Sure.

3 MR. ANGELICH: We filed a 2004 in the main case to
4 take certain discovery of former officers of the company.

5 THE COURT: These are the people who are objecting?

6 MR. ANGELICH: Well, not exactly.

7 THE COURT: Okay.

8 MR. ANGELICH: The former general counsel on a few
9 other key officers who, right now, are not targets of the
10 action. We withdrew that 2004 yesterday by letter we've lodged
11 on the Court's docket.

12 THE COURT: I did know that. Okay.

13 MR. ANGELICH: Just to make Your Honor aware, we've
14 received cooperation voluntarily from all three of those
15 witnesses and they've been very helpful. And they've agreed to
16 continue to cooperate, so we have no reason to seek an order or
17 a subpoena at this point.

18 THE COURT: Okay.

19 MR. ANGELICH: Some of those individuals we had
20 already spoken to --

21 THE COURT: And I was advised that that was withdrawn
22 and dismissed.

23 MR. ANGELICH: Yes. And just so Your Honor is aware,
24 we had spoken to at least one of those individuals previously
25 and they had indicated willingness to continue to cooperate,

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1 but for various reasons it wasn't until we filed the motion
2 that we got everyone's attention again.

3 But moving on to the 9019 and the adversary
4 proceeding --

5 THE COURT: Okay, just so we're clear -- so I gave the
6 adversary proceeding number. It's 14-02213. The motion that's
7 pending is the joint motion of the official committee of
8 unsecured creditors and the debtors for an order approving
9 settlement agreement between the represented defendants under
10 Rule 9019. The motion is filed as ECF docket number 709, and
11 in adversary proceeding 14-02213, it's ECF docket number 23.

12 MR. ANGELICH: Thank you, Your Honor. Last week we
13 were all a little caught off guard by the objection that we
14 received from the objecting parties. But --

15 THE COURT: So who's here for the objecting parties?

16 MR. CAVALIERE: Rocco Cavaliere of Tarter Krinsky.

17 THE COURT: Okay, Mr. Cavaliere.

18 MR. ANGELICH: But we appreciate they have certain
19 issues and concerns with the settlement. That being said,
20 Leucadia's settlement really sort of paves or cuts a path
21 towards a possible plan of liquidation. And if it were
22 approved, it would provide eight million dollars to the estate,
23 which would close almost completely the administrative
24 insolvency gap that we currently have.

25 THE COURT: That's what they're worried about because

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1 they're next in line for your threatened claims against them.

2 MR. ANGELICH: Yes, Your Honor. And we've had some
3 productive discussions since the fall concerning some of the
4 insider claims, the preference claims. We even had meeting
5 with the defendants. I won't get into any 408 conversations.

6 THE COURT: Right.

7 MR. ANGELICH: And please stop me if I'm even heading
8 in that direction. But we've had discussions directly with the
9 Ds and Os, and one of the two insurance carriers. And we had,
10 we thought, some productive conversations on April 21st. We
11 gave them a one-hour presentation about the claims we thought
12 we might be bringing in and then without a single mention at
13 that meeting or after that meeting, we got this, which was
14 quite a shock.

15 But we do believe that this still offers a material
16 step forward towards a liquidating plan. The sole objection,
17 as Your Honor has noted, is from a group of insiders who, as
18 you know --

19 THE COURT: May I ask this?

20 MR. ANGELICH: Uh-huh.

21 THE COURT: Is it D&O insurance or --

22 MR. ANGELICH: No, with --

23 THE COURT: -- a fiduciary policy? What's the
24 insurance that you're looking toward?

25 MR. ANGELICH: Sure. There is -- so this action, the

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1 Leucadia action, does not involve any D&O.

2 THE COURT: I know. But I guess I'm talking about Mr.
3 Cavaliere's clients.

4 MR. ANGELICH: Right.

5 THE COURT: Is there insurance? What kind of
6 coverage?

7 MR. ANGELICH: Yes, Your Honor, there --

8 THE COURT: What are policy amounts? That's all
9 discoverable information, so I'm not asking anything --

10 MR. ANGELICH: Understood, Your Honor.

11 THE COURT: -- I'm sure hasn't been explored.

12 MR. ANGELICH: There are two policies. There's a five
13 million dollar policy and then a five million dollar excess
14 policy.

15 THE COURT: It's D&O?

16 MR. ANGELICH: Yes. Yes, Your Honor. And the acts
17 that we have identified, we believe, fall within the definition
18 of wrongful acts for coverage. So the answer to Your Honor's
19 question is yes, there is a policy in place.

20 THE COURT: Who represents the D&O carrier?

21 MR. ANGELICH: Arnold & Peabody (sic).

22 THE COURT: Who provided the primary and who the
23 excess?

24 MR. ANGELICH: Hiscox is the primary. The excess is
25 Torus. That's sort of their street names. They go by other

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1 identifications, State National Insurance.

2 THE COURT: And they do have counsel?

3 MR. ANGELICH: They do. Arnold & Peabody (sic)
4 represents the primary. We haven't yet sat down with the
5 excess attorneys.

6 THE COURT: Okay.

7 MR. ANGELICH: So --

8 THE COURT: How do you want to move forward? I mean,
9 so I have this proposed settlement in front of me. Mr.
10 Cavaliere, you won't find it a complete surprise that the Court
11 always views with some suspicion or skepticism when the
12 objections to a settlement are the likely next group of targets
13 for litigation if the claim is settled. That isn't to say -- I
14 want to be clear, that isn't to say you don't have a valid
15 objection, but it's not the first time I've seen it. And it
16 does at least raise some skepticism on my part. But I'll give
17 you a chance to address.

18 Go ahead, Mr. Angelich.

19 MR. ANGELICH: Your Honor, what we agreed to late last
20 week was that we would try to put process in place to address
21 some of the insiders' concerns with the group of claims that
22 we're about to bring next.

23 And if somehow we're able to pull this all together
24 and come back to you, Your Honor, with a big bow on the
25 preference claims and the D&O claims, and if we're able to

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1 accomplish that in a short period of time, then I think it
2 makes a lot of sense to just sort of push this out thirty days
3 or so and let's see where we're able to get to.

4 And hopefully by then, we can report back to you that
5 we either have a nice global settlement and everything's been
6 resolved, or we actually need to have oral argument on some of
7 these issues.

8 THE COURT: Tell me -- so Mr. Cavaliere's argued that
9 the Court would be required to have an evidentiary hearing on
10 approval of the 9019. I suspect you think you don't need it,
11 but let's assume that the Court believes I need to have an
12 evidentiary hearing. What evidence is it that you -- not the
13 specifics of the proof, but what witnesses would you expect to
14 call? How would you proceed with an evidentiary hearing to
15 establish that your proposed settlement with Leucadia is fair,
16 reasonable, and in the best interests of the estate?

17 MR. ANGELICH: So there's -- let me address one issue
18 first and get it out of the way, and that is we submitted a
19 declaration and a reply about a former attorney-client
20 relationship my firm had twelve years ago with Leucadia.
21 That's been flagged as an issue.

22 THE COURT: And it was -- and I'm not making any
23 rulings at all. I wasn't particularly impressed, Mr.
24 Cavaliere, about your raising an issue whether Arent Fox has a
25 conflict because -- how many years ago?

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1 MR. ANGELICH: Twelve years.

2 THE COURT: Twelve years ago they represented
3 Leucadia. I mean, it is not a particularly appealing argument.
4 Let's put it that way.

5 MR. CAVALIERE: I just --

6 THE COURT: Are you continued (sic) to press that?

7 MR. CAVALIERE: At the time that we filed the
8 objection, all of the details associated with when that
9 relationship ended were not privy to me, Your Honor. So that's
10 part of the reason why we raised it and looking for some
11 information with regard --

12 THE COURT: Okay. Are you -- with respect to that
13 issue, are you now satisfied?

14 MR. CAVALIERE: With respect to that issue, we are
15 satisfied, Your Honor.

16 THE COURT: Okay, all right.

17 MR. CAVALIERE: Although we do think creditors have a
18 right to have seen it and made their own decision and
19 determination. It could have been highlighted in a footnote.
20 But I'm not going to press forward on that particular issue.

21 THE COURT: Okay, so we put that issue to rest, Mr.
22 Angelich.

23 MR. ANGELICH: Thank you, Your Honor. So --

24 THE COURT: What other evidence would you anticipate?
25 You're not going to -- and I have heard -- you don't need to

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1 deal with the alleged conflict from a twelve-year-prior
2 representation.

3 MR. ANGELICH: With that issue out of the way, Your
4 Honor, we would present three witnesses in support of the 9019
5 motion.

6 The first would be reflected in the affidavit that we
7 filed last Friday of Eric Roman, who is with me at counsel
8 table, who was involved in the prosecution of those claims and
9 negotiation of those claims, and was very closely involved in
10 analyzing the defenses of Leucadia.

11 And we formed a good-faith basis to conclude that we
12 had a reason to settle in the range we settled.

13 THE COURT: After I dismissed a good part of your
14 claims.

15 MR. ANGELICH: Yes, Your Honor.

16 THE COURT: I think I wrote an opinion that dealt with
17 it. I understand --

18 MR. ANGELICH: We --

19 THE COURT: -- why you might have -- I'm not saying
20 it's the right decision, but you certainly -- on some claims I
21 dismissed without leave to amend and some with leave to amend,
22 and some survived.

23 MR. ANGELICH: Yes, Your Honor. And we took your
24 opinion to heart, and we analyzed it carefully. And we
25 understood there were ways to address Your Honor's issues and
concerns. And we were prepared to go forward, but within a

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1 week of receiving Your Honor's opinion, we were approached
2 about a global settlement.

3 THE COURT: Okay.

4 MR. ANGELICH: So Mr. Roman would be -- his affidavit
5 would be put into evidence. The next affidavit that we would
6 put into evidence, and if we had to call as a witness --

7 THE COURT: Yeah, and you hit it on the nose. The way
8 I would ordinarily proceed is the direct testimony by affidavit
9 with the declarant available for cross-examination in court
10 would be the -- unless the objectors present me with compelling
11 arguments why the direct shouldn't be by affidavit, that would
12 ordinarily be the way in which I would proceed. Obviously,
13 they'd have to be here for cross-examination.

14 MR. ANGELICH: And they would be, Your Honor. And the
15 next would be Bill Lenhart. Mr. Lenhart was a managing
16 director and led the insolvency practice at BDO, is now a
17 private consultant and still affiliated with BDO, and is still
18 an advisor to the creditors' committee.

19 He would testify as to some of the business analysis
20 that the committee engaged in to evaluate the merits of
21 settling, the process that we undertook to evaluate the
22 different alternatives going forward versus settling and
23 accepting the deal as it was negotiated and ultimately
24 presented to us as the final offer.

25 THE COURT: Okay.

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1 MR. ANGELICH: And then the final affidavit, the
2 third, would be the affidavit of B. Lee Fletcher, who is the
3 acting chief financial officer of the debtors, who has signed
4 an affidavit, Your Honor, stating that this settlement closes
5 the gap on administrative insolvency, and in some scenarios
6 puts his wealth through priority claims and potentially pays
7 off all priority claims. So the --

8 THE COURT: So tell me -- let's assume the settlement
9 is approved, what potential claims -- because a lot of them
10 haven't been filed yet -- what claims do you believe remain?
11 So I know --

12 MR. ANGELICH: Yes.

13 THE COURT: -- there's these potential insider claims.
14 Other than the potential insider claims, are there other claims
15 that --

16 MR. ANGELICH: So we have this --

17 THE COURT: What's this --

18 MR. ANGELICH: -- sort of preference program that's
19 going on, Your Honor, and then we have claims against the
20 insiders for preference and potentially fraudulent conveyance.
21 And then we have the D&O action that we have the ten million
22 dollars in coverage.

23 So those are the three buckets of potential claims.

24 THE COURT: All right. Let me hear from Mr.
25 Cavaliere. Are you -- Mr. Schmidt, do you want to be heard

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1 first and then I'll --

2 MR. SCHMIDT: Yeah, I just wanted to let the --

3 THE COURT: We'll get everybody on one side first.

4 MR. SCHMIDT: I just wanted to let the Court know that
5 there was one other bucket that was pre-petition. There was a
6 spinoff -- a sale of one of the businesses. Your Honor may
7 recall the Unidos note that we had speaking about during the
8 case. There was a payment that was due on that note. There
9 has been --

10 THE COURT: There's a real collectability issue,
11 though, isn't there?

12 MR. SCHMIDT: Well, we think there actually is a
13 collectable -- we think that they're good for it. They have
14 raised issues regarding pre-petition alleged lack of disclosure
15 of liabilities as an escape hatch, and we've been discussing
16 with them. We've had our businesspeople speak with the --

17 THE COURT: How much is the note?

18 MR. SCHMIDT: A million, two-five. So it's not
19 nothing, Your Honor. It was a part of the -- or the recoveries
20 thereof were a part of the sale of the business, fifty percent
21 of the net proceeds.

22 But so far, unfortunately, we've had to expend some
23 legal expenses, so I'm not sure what that's going to be for
24 them.

25 THE COURT: Okay, thanks. Mr. Cavaliere?

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1 MR. CAVALIERE: Good afternoon, Your Honor. Your
2 Honor, I think since the filing of --

3 THE COURT: Just make your full appearance again since
4 the first time you've given it.

5 MR. CAVALIERE: Oh, sure. Rocco Cavaliere, Tarter
6 Krinsky & Drogin on behalf of the various objecting parties.

7 Your Honor, we filed the objection last Tuesday
8 because we believe, as holders of the largest claims in the
9 case, as well as parties that are directors in this case, have
10 rights and we have a right to be heard. I understand --

11 THE COURT: I'm hearing you.

12 MR. CAVALIERE: -- Your Honor's skepticism in that
13 regard with regards to insiders. And in that regard --

14 THE COURT: You're not surprised at that, I assume.

15 MR. CAVALIERE: No, I'm not, Your Honor. But we
16 are -- we do have thirteen million dollars in unsecured claims,
17 which, by my estimation, is fifteen to twenty percent of the
18 unsecured creditor pool here, a substantial interest in this
19 case, and we would argue the largest victims in this case.

20 And with regards to the preference claims, people hear
21 about preference claims --

22 THE COURT: I always get skeptical when people say the
23 insiders are the largest victims in a case. But --

24 MR. CAVALIERE: Well, there are many victims. It's an
25 unfortunate circumstance.

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1 THE COURT: I think they may have been asleep at the
2 switch, but --

3 MR. CAVALIERE: Well that -- there are no facts to
4 support that; part of the problem here that we're having with
5 committee counsel. There are various allegations that are all
6 constantly raised with regards to Mr. de la Garza, but no -- if
7 you ask them for proof, backup support, draft complaint,
8 nothing is forthcoming because --

9 THE COURT: Be careful what you ask for, because you
10 may get it.

11 MR. CAVALIERE: I'm happy to receive it.

12 THE COURT: It won't be a draft. It'll be filed.

13 MR. CAVALIERE: Well, it may very well be and that --
14 unfortunately, if that was to take place, I think that would
15 be -- create more issues in the case than -- and that's why I
16 think that it's productive that the parties have engaged in
17 some good-faith discussions through Mr. Schmidt's mediation
18 skills, if you will.

19 And I think while we certainly haven't reached a
20 resolution of the preference claims, I think we do have --
21 we've gotten in the right -- taken it to the right position
22 where I think that we have a framework for possibly reaching a
23 deal.

24 And then ultimately, with regards to the alleged
25 directors and officers claims -- because they are covered by

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1 insurance -- we've had some preliminary discussions with the
2 insurance carrier. We're happy to have committee call the
3 insurance carrier directly as well, and I understand that that
4 will -- and we'll participate as much as possible. But those
5 discussions --

6 THE COURT: Rather than a call, what I have found in
7 the past is that if you and Mr. Angelich will -- and Mr.
8 Schmidt -- arrange a face-to-face meeting in which you can get
9 representatives of the insurers present as well -- face-to-face
10 meeting with your clients, the committee counsel, and a
11 businessperson from the committee, frankly, or from the debtor,
12 and actually get yourself in a room together, lock yourself in
13 a room and try and hash this through so you -- because
14 otherwise what I have found is you'll have a conversation with
15 Mr. Angelich or Mr. Schmidt. And you'll have questions.
16 They'll have questions. And then you'll go back and you'll
17 talk to the insurers' counsel, and they'll have some more
18 questions. And the process will go on for a very long time,
19 and none of this will get resolved, and that the fastest way to
20 try and move it along is to get everybody in a room, committed
21 to have a serious discussion about trying to resolve the
22 matters, understanding what reasonable requests for information
23 each side may have and the insurers before -- insurers don't
24 like to write checks. What information they have, and try and
25 move it along.

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1 Otherwise, you're going to have this series of one-off
2 conversations and you'll be back here in three or six months
3 and the ball will have not advanced very far.

4 Preference claims, it's different because insurance
5 isn't going to cover those.

6 MR. CAVALIERE: Understood. And with regards to the
7 meeting, I think that's a fabulous idea. There was an initial
8 meeting on April 21st, as Mr. Angelich alluded to, where the
9 insurance carrier did attend with my client --

10 THE COURT: Okay.

11 MR. CAVALIERE: -- and a couple of colleagues of mine.
12 They did a presentation. Unfortunately, it didn't advance the
13 ball enough to result in a settlement, but when I asked for a
14 draft complaint and Your Honor alluded to the fact be careful
15 what you ask for, that -- in our view, that is a step towards
16 convincing the insurance carriers the seriousness of the
17 allegations to the extent that --

18 THE COURT: Okay.

19 MR. CAVALIERE: -- and we would provide a draft
20 answer. This is actually protocol that we'd discussed but it
21 hasn't been followed. And we think that it could be productive
22 to actually force the settlement, because otherwise it's just
23 people speaking about various allegations, as opposed to
24 actually demonstrating some proof.

25 With regards to the preference claims, one of the

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1 frustrations on our end, we have drafted three substantive
2 letters and an e-mail with some analysis over the course of the
3 last few months, and we haven't received one response, one
4 actual detailed response citing to any particular reasons why
5 our analysis is not correct.

6 We believe we have meritorious defenses, subsequent in
7 value, in ordinary course. There's a collection issue. There
8 is a savings of costs issue, the fact that we have thirteen
9 million dollars --

10 THE COURT: What's the collection issue?

11 MR. CAVALIERE: Well, Your Honor, my client is located
12 in Mexico and frankly, we believe we have strong defenses. We
13 don't believe that, ultimately -- that Your Honor will find
14 that they're liable in any way.

15 But to the extent that you do, we -- the Committee is
16 going to have to chase them down for some money. And I don't
17 believe that -- well, we'll get that far, but there has --
18 these are all aspects of reasons why people settle cases. And
19 I'm not getting that yet, although I will say this, there was
20 much movement through Mr. Schmidt's efforts late last week, and
21 I hope that the continued discussions take the same path
22 towards a conclusion on that issue.

23 So, Your Honor, I just -- I do want to note something
24 also on the Rule 2004 motion that was withdrawn. We filed an
25 objection to it. The committee was looking for testimony from

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1 former officers that are not slated to be targets, and that's
2 fine. We're not looking to add more targets. I represent the
3 directors and so forth.

4 But one of the former -- one of the parties that is
5 subject of that Rule 2004 that has been withdrawn, which was
6 voluntarily decided to provide information, is -- the one whose
7 name is Roberta Kraus, she is former general counsel of the
8 debtors. And we raised some significant concerns about her
9 testimony with regards to attorney-client privileged
10 communications that she may have had with the company, which my
11 clients are directors and shareholder, may have, when
12 consulting with her on legal advice, may have had the
13 impression that she was providing advice.

14 THE COURT: Who holds the privilege?

15 MR. CAVALIERE: I -- that's a great question. The
16 debtors hold the privilege, although one could argue maybe the
17 directors do.

18 THE COURT: You think so? Do you have any authority
19 for that? Who holds the privilege?

20 MR. CAVALIERE: Not right now. The debtors.

21 THE COURT: I think you have a problem.

22 MR. CAVALIERE: It could be argued that the debtors
23 are my clients. My clients are on the board of the debtors.

24 THE COURT: Oh, I don't think so, but that's --

25 MR. CAVALIERE: Okay, but I'm just concerned

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1 about -- if there are going to be interviews, I'd like an
2 opportunity to sit in. If there are going to be documents
3 exchanged --

4 THE COURT: Oh, you're not going to sit in. You
5 can -- the committee or the debtor or both and their counsel
6 can conduct interviews without you there. If it gets to
7 litigation and a deposition is noticed, obviously you'd have a
8 right to be there. But you're not going to -- you're certainly
9 not going to get any order from me entitling you to be present
10 when the committee or the debtors or both interview prospective
11 witnesses in their effort to develop information.

12 But here's what we're going to do for now: Vivaro is
13 on the calendar on June 25th at 10 a.m. I'm going to adjourn
14 the conference in the Leucadia matter until June 25th at 11
15 a.m. I don't know whether we can finish with the first part of
16 the calendar by 11, but we'll set it at 11.

17 I would ask, Mr. Angelich, that you file a written
18 status report on or before Monday, June 22nd at 5 o'clock with
19 respect to the matter.

20 What I anticipate will happen is that will be -- the
21 25th will be a status conference again. If necessary, at that
22 time, I'll schedule a hearing -- an evidentiary hearing,
23 approval of the settlement.

24 Mr. Cavaliere, how many witnesses would you expect to
25 call? And again, I would expect that you would put in

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1 declarations in advance and declarants would be present for
2 cross-examination in court, and we'd proceed with -- Mr.
3 Angelich has told me who the three people he's going to call.
4 Do you know, at this point, who you would call in opposition?

5 MR. CAVALIERE: I don't know just yet, Your Honor. I
6 do believe that I will take the cross-examination of the three
7 individuals.

8 THE COURT: I'm sure you will, but --

9 MR. CAVALIERE: I've already reviewed their
10 declarations --

11 THE COURT: -- because I need to know --

12 MR. CAVALIERE: -- and have a number of questions.

13 THE COURT: Certainly by the 25th you have to be
14 prepared to identify on the record who the witnesses you intend
15 to call, not just give me a laundry list that you may or may
16 not call. By the 25th, if this isn't resolved and I have to
17 schedule an evidentiary hearing, I want to know exactly who it
18 is you intend to call as witnesses at a hearing on approval of
19 the settlement. And if necessary, on that June 25th date, I'll
20 set an evidentiary hearing. In all likelihood, it would just
21 be a couple of weeks later. I mean, we're not -- this is not
22 going to get dragged out.

23 MR. CAVALIERE: Understood, Your Honor.

24 THE COURT: Okay.

25 MR. CAVALIERE: What I may do to advance the ball --

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1 THE COURT: Sure.

2 MR. CAVALIERE: -- on my end to determine which
3 potential witnesses I may want to call, I may -- again, I don't
4 want to rub anyone the wrong way with regards to the current
5 posture where we are. I think everyone wants to work together
6 towards a settlement of all issues, but perhaps on a parallel
7 track, I may serve some subpoenas for some documents relevant
8 to this motion that --

9 THE COURT: On what basis do you think you can serve
10 subpoenas for production of documents?

11 MR. CAVALIERE: Well, Your Honor, it's a contested
12 matter and I think that the --

13 THE COURT: What's a con --

14 MR. CAVALIERE: It's a motion that was objected to.
15 We have a right to -- just for documents with regard to -- that
16 may be in the possession of the committee and that may have --

17 THE COURT: Well, a 9014 -- in a contested matter, on
18 9014, I control -- there's an issue of to what extent do the
19 rules for adversary proceedings apply. I'm not making any
20 determination about it now.

21 MR. CAVALIERE: Okay.

22 THE COURT: In the first instance, you'll try and work
23 those issues out with Mr. Angelich, okay?

24 MR. CAVALIERE: Okay, understood. I'll do my best to
25 just informally ask specific questions of documents they may

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1 have in their possession.

2 THE COURT: All right, that's fair enough.

3 MR. CAVALIERE: And then I can come back to the Court,
4 if necessary.

5 THE COURT: So we're shooting for that hearing on the
6 25th. I asked Mr. Angelich to file that status letter by the
7 22nd. If you feel that you need to separately file a status
8 letter, you can do it the same date and time. You could also
9 confer with Mr. Angelich and file a single letter that
10 addresses both of your concerns. Okay?

11 MR. CAVALIERE: Okay. He's not talking to me right
12 now, Your Honor, so --

13 THE COURT: He's not?

14 MR. CAVALIERE: -- we assume he will be.

15 THE COURT: No?

16 Briefly.

17 MR. ANGELICH: Very briefly. I could respond to just
18 about --

19 THE COURT: But you won't.

20 MR. ANGELICH: -- everything he said.

21 THE COURT: I understand, but you're not going to.

22 MR. ANGELICH: But I won't. But I will say this, Your
23 Honor, we're going to get a bunch of document requests and
24 information requests, and we are going to assert privilege to
25 the extent that there is any information that's being requested

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1 that was provided or exchanged between the committee and its
2 counsel. I really hope we don't waste the Court's time
3 fighting over that type of stuff.

4 THE COURT: I hope you don't as well. If you have a
5 discovery dispute, you know my procedures. You meet and confer
6 in an effort to resolve it. If you can't, the party needing
7 the assistance of the Court calls and arranges a prompt
8 hearing. I generally hold those hearings within a day or two
9 of the request. And it's rare that I ever need briefing on it
10 and it's usually only letter briefs when I do.

11 I would say in the last eight and a half years, I've
12 only asked for letter briefs three or four times total, and the
13 rest of them I've resolved the issues just by listening to
14 counsel argue their positions.

15 Sometimes where the issue is privilege, I have asked
16 for some letter briefs, but even on that, I think I have a
17 pretty good sense of what the law and privilege is. Okay?

18 MR. ANGELICH: Thank you, Your Honor.

19 THE COURT: Thanks.

20 MR. CAVALIERE: Thank you, Your Honor.

21 THE COURT: Somebody else wanted to be heard. Come on
22 up.

23 MR. SOUTH: Your Honor, George South of DLA Piper on
24 behalf of Leucadia and Baldwin defendants. I just wanted to
25 let the Court know that I'm present in the Court if there's

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1 anything --

2 THE COURT: Wanted to get the settlement approved.

3 MR. SOUTH: That would be great, Your Honor. But we
4 understand there might be some delay and we're okay with that.
5 But --

6 THE COURT: We're going to move it along. I'm sure
7 your client wants to pay its eight million dollars and --

8 MR. SOUTH: It's a Catch-22.

9 THE COURT: It's burning a hole in its pocket.

10 MR. SOUTH: Right.

11 THE COURT: It wants to pay it very promptly.

12 MR. SOUTH: I assume the Court doesn't have any
13 questions for me, but I wanted to give you an opportunity in
14 case you did.

15 THE COURT: Well, you would certainly -- I mean, at a
16 hearing on approval, you're a party-in-interest on that for
17 sure.

18 MR. SOUTH: Yes. I don't expect that we'd have a fact
19 witness --

20 THE COURT: Okay, that's fine.

21 MR. SOUTH: -- if we were to --

22 THE COURT: But you're going to let me know -- you're
23 going to let everybody know by that date for the status
24 reports, which I said was the 22nd of June, if you're intending
25 to call any witnesses, please identify them then so

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1 everybody -- when we come in on the 25th, everybody knows
2 what's happening. Okay?

3 MR. SOUTH: Yes, Your Honor.

4 THE COURT: Thanks very much. All right.

5 Anybody else want to be heard?

6 Mr. Schmidt?

7 MR. SCHMIDT: Yes, Your Honor. I just want to make it
8 clear on the record because I heard something about a mediation
9 in this case. I wanted to make it clear that I am not acting
10 as a mediator per se.

11 THE COURT: You know --

12 MR. SCHMIDT: I am on the panel, but I am clearly
13 interested. I'm not disinterested. I'm a partisan in this.
14 I'm just trying to facilitate a deal if I can.

15 THE COURT: I understood that, okay?

16 MR. SCHMIDT: I thought Your Honor did. I just wanted
17 to make sure it was on the record.

18 THE COURT: If they all trust you, keep trying. Okay?

19 MR. SCHMIDT: Just to be --

20 THE COURT: They all recognize that you're not the
21 mediator in the case. But that doesn't mean that you can't try
22 and bring the parties together to get it resolved. Okay?

23 MR. ANGELICH: And we really appreciate Mr. Schmidt's
24 efforts, especially late last week when this was looking like
25 it was going to come off the rails entirely.

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1 But one of the things that we've mentioned in our
2 reply, it sort of mirrors one of the objecting parties' points,
3 and that is maybe we need to have a really good effort at good-
4 faith settlement here, and we're going to really talk to each
5 other. And maybe that really needs to have a mediator
6 involved. So I think if Mr. Cavaliere is agreeable to that,
7 we're prepared to identify one now.

8 THE COURT: I think -- I'm a big supporter of
9 mediation. I don't have a -- I think it ought to be
10 consensual. There are a lot of good mediators around. There's
11 good counsel on all sides. Nothing stops you from talking to
12 each other and if you think that mediation -- talk to Mr.
13 Cavaliere. If you believe that a mediation will help, I
14 suspect that you will be able to agree on someone who could
15 knock heads and help get it done. Okay?

16 MR. ANGELICH: Thank you, Your Honor.

17 THE COURT: All right. Put that -- look, and if you
18 do decide to mediate, give me a status letter right away on
19 that issue. Okay? I'm not adjourning any of the hearings I've
20 set, but I do want it -- so if you do mediate, move it along, I
21 would consider at some point, if you're making progress in
22 mediation, pushing the dates a little bit. Okay?

23 (Whereupon these proceedings were concluded at 3:29 PM)
24
25